No. 134

In the Supreme Court of the United States

October Term, 1955.

CLARK SQUIRE, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF WASHINGTON, *Petitioner,*

vs.

HORTON CAPOEMAN AND EMMA CAPOEMAN, HIS WIFE.

On a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE.*

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Comes now the applicant, George H. Brasier, and moves the Court for an order granting leave to file a comprehensive brief *amicus curiae* in the herein cause for the following reasons hereinafter enumerated, to-wit:

1. That the applicant is now engaged in prosecuting an income controversy, *Brasier* v. *United States, et al.*, involving the issues presented in the instant cause and pending on appeal before the Court of Appeals for the Tenth Circuit. That the applicant is proceeding in the above mentioned controversy *pro se* as attorney-in-fact, pursuant to his substantive prerogatives in the premise, in an effort to stay the tax gatherers in their unlawful purpose and to recover that which has been alleged to be unlawfully assessed and collected from increments derived by the United States, as trustee, in behalf of its sovereign ward, Mary Brasier, Osage Indian Allottee No. 666, as her pro-rata share of

head-right interests in the mineral rights of the Osage Indian Nation.

2. The Solicitor General, in his petition for writ of certiorari, has stated that the instant case is one of continuing importance in the administration of the revenue laws and to approximately 225,000 Indians holding a total of about 13,600,000 acres of restricted, allotted lands with "income" of more than $12,300,000 in the form of rents, royalties, bonuses from oil and gas leases and from the sale of timber from these restricted, allotted lands. In summing up these facts and figures, the allotted lands would amount to about 60 acres per allottee, and about $50.00 yearly "income" derived from these allotted lands, by the trustee, per allottee. (Pet. 8-9)

The applicant, having read the petition and brief in opposition in the herein controversy, bringing forth the issue of a conflict before this Honorable Court, and being cognizant of the need for a more comprehensive presentation of the facts and questions of law, relevant to the complete disposition of the instant controversy, and to the 225,000 Indian allottees who will be affected by the outcome, files the herein motion. In respect to the facts, the immutable enunciation by the Honorable Harold L. Ickes, found in the Foreward of the Handbook of the Federal Indian Law, is considered appropriate and authoritative. Applicant quotes in part and makes said Handbook and the Supplement thereof a part hereof by reference:

> "That Indians have legal rights is a matter of little practical consequence unless the Indians themselves and those who deal with them are aware of those rights. Such, however, is the complexity of the body of Indian law, based upon more than 4,000 treaties and statutes and upon thousands of judicial decisions and adminis-

trative rulings, rendered during a century and a half, that one can well understand the vast ignorance of the subject that prevails even in ordinary well informed quarters. For more than a century, commissioners of Indian affairs have appealed for aid in reducing this unmanagable mass of materials to some orderly form. Yet during that period none of the attempts to compile a simple manual of the subject was carried to completion.

"Ignorance of one's legal rights is always the handmaid of despotism. This Handbook of Federal Indian Law should give to Indians useful weapons in the continual struggle that every minority must wage to maintain its liberaties, and at the same time it should give to those who deal with Indians, whether on behalf of the federal or state governments or as private individuals, the understanding which may prevent oppression."

In regard to the questions of law, *supra*, applicant sets out the following:

(*a*) Whether the Sixteenth Amendment to the Constitution of the United States amends Artiele I, Section 2, Clause 3, where it is expressly stated: "and excluding Indians not taxed," to include Indians not taxed, where they (Indians)[1] are not specifically mentioned therein.

(b) Whether trust allotments, held in trust by the United States for individual Indian Allottees, are technically properties of the United States, until such time as the trust allotments are delivered at the end of the designated period, in absolute title fee to the allottee.

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[1] Indians as we knew them in our early history, in the building of this Nation, (with their lands), are the Indians of to-day—unemancipated, and under the protection supervision and care of the United States. Their sovereignty as Internal Nations being transferred to the United States by the Act of March 3, 1871 (16 Stat. 544, 566, R. S. Sec. 2079).

SUPREME COURT, U. S.

JAN 6 1956

HAROLD B. WILLEY, Clerk

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v.

HORTON CAPOEMAN AND EMMA CAPOEMAN, HIS WIFE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE

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REASON FOR BRIEF

The following brief amicus curiae is being submitted in behalf of the Coeur d'Alene Tribe, Coeur d'Alene Indian Reservation, Idaho, and the Affiliated Tribes of Northwest Indians of which almost all, if not all, the tribes of Montana, Idaho, Oregon and Washington are members. Each of these tribes feels it has a direct interest in the outcome of this case. The Coeur d'Alene Tribe is typical in that it has both unallotted tribal land and land allotted to particular Indians. Allotted Indians derive income both from sale of timber and from agricultural leases.

Robert D. Dellwo, of Counsel, is attorney for Julia Nicodemus, an enrolled member of the Coeur d'Alene Tribe who is plaintiff in the Indian tax case, *Julia Nicodemus* v. *United States of America*, 132 F. Supp. 608, which was decided in favor of the Indian plaintiff. Her suit is similar to that of plaintiff in captioned case, except it is for a refund of taxes paid on agricultural rentals from Indian trust property either initially allotted her or inherited by her. Her case therefore carries with it a broader question than instant case—the question of whether or not agricultural rentals from such property are taxable under the income tax laws of the United States. This brief will therefore be restricted to a discussion of the law pertaining to the taxability of general income, regardless of source, from Indian trust property.

QUESTION PRESENTED

Whether income from allotted, restricted land held in trust by the United States for noncompetent Quinaielt Indians is exempt from federal income tax.

SUMMARY OF ARGUMENT

The pertinent treaty, the General Allotment Act of 1887 and the trust patents issued thereunder by plain implication exempt the income from allotted, restricted Indian lands from federal income tax. This implication springs not only from a logical interpretation of said treaty and General Allotment Act and the trust patents issued thereunder but from the general case law of the

courts of this country governing the interpretation of such treaties and the difference in the application of tax laws to Indians, such as plaintiffs, and to non-Indians.

As a part of the foregoing argument is a second argument that, if said treaty and General Allotment Act do not by plain implication provide such exemption, the ambiguity or doubt as to whether they do or not has already been resolved in favor of exemption by the Government of the United States through the Department of Interior and the Bureau of Internal Revenue. In this regard, it is clear that the Government of the United States, the dominant party which drew all the treaties and agreements upon which this claimed exemption is based throughout the country, has, until recently, uniformly interpreted said treaties and agreements in favor of exemption. This interpretation was not of the nature of administrative interpretation of the law by government employees not binding on the government but was of the nature of an interpretation of a contract, treaty or agreement by the dominant party. Not only were the Indians entitled to rely on such interpretation, but the government, as the dominant party to the contract, treaty or agreement interpreted, is now estopped to deny its own interpretation.

ARGUMENT

INCOME DERIVED BY INDIAN ALLOTTEES FROM LAND HELD IN TRUST FOR THEM BY THE UNITED STATES IS NOT SUBJECT TO FEDERAL INCOME TAX.

The treaty with the Quinaielts, 12 Stat. 971, of which pertinent portions are quoted on page 39 in petitioner's brief, provided for the setting aside of a certain area of land for the "exclusive use" of the members of said tribe of Indians. As a part of this treaty the tribe gave up its aboriginal rights to vast areas of valuable land. In the making of the treaty the United States, in effect, treated the tribe as a sovereign nation and in return for vast concessions by the tribe, consisting of a conveyance to the United States of its vast lands, that tribe was to have the exclusive use forever of the small area of land which ultimately became the Indian Reservation.

One can study this treaty or any other Indian treaty in the United States in vain for any intent on the part of the contracting parties to do other than reserve forever for the exclusive use of the Indians the lands reserved for them. Such use was apparently to be a collective, communal use or perhaps the Indian nations themselves were to devise some manner of division of the property among their members. At any rate, in due course, the General Allotment Act of 1887, 24 Stat. 388, 25 USCA 331 et seq., was passed by the Congress of the United States.

This Act provided for the allotment to individual members of the various tribes, including the Quinaielts, of portions of the reservation upon which individual Indians might be able to make a living in agricultural or grazing pursuits. The intent of this Act was to assign to particular Indians specific portions of land. This assignment was called an "Allotment."

To effectuate these allotments trust patents were issued and, in accordance with the General Allotment Act of 1887, the trust patents were to provide and did provide that the United States Government would hold such land in trust for the particular Indian allottee for the "sole use and benefit of the Indian" and would ultimately, at the termination of the trust, convey the same to "said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever." The Act then provided that any contracts touching the land prior to the expiration of the trust would be null and void. This provision was to protect the Indian against any possibility that he himself or anyone else might, in effect, encumber the property.

The Act then provided (25 USCA, Sec. 348) that at the conclusion of the allotment and the issuing of the fee patents the Indian allottee would, in effect, become subject to and have the benefit of the laws of the state or territory in which he resides.

A. *The Quinaielt Treaty and subsequent legislation plainly imply exemption from Federal Income Tax.*

Whereas, the case of *Jones v. Taunah*, 186 F. 2d 445, and the Government, in this case, seek to apply the general law that exemption from income tax is never implied, the fact is that in the field of law known as "Indian Law," as distinct from "White Man's Law," immunity from taxation of restricted Indian property and income therefrom is implied unless expressly covered.

The case of *Lewellyn* v. *Colonial Trust Company*, 17 F. 2d 36, demonstrates the distinction between "Indian Law" and "White Man's Law."

> "That as legislation imposing taxation by government on citizens must be clear and free from doubts, and all doubts therein must be resolved in favor of the citizen (citing cases) any legislation by government imposing taxation on its dependent ward must be in certain and indubitable terms. (Choate v. Trapp, 244 U. S. 665).
>
> "That, in the absence of any expressed purpose of Congress to change the uniform and unbroken policy of the government to regard and deal with the Indian tribes as wards and dependents, the purpose and intent of Congress to change that policy, and impose a tax by government on its wards, will not be implied, and the general terms of the income tax statute should not be construed to embrace the Indian wards of the government."
>
> In support of this, reference is made to the Quapaw Indians, 34 Ops. Atty. Gen. 439, where it is said, 'In other words, it is not lightly to be assumed that Congress intended to tax the ward for the benemit of the guardian,' and Choate v. Trapp, supra, where it is said 'The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the U. S., are to be resolved in favor of a week and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith.'
>
> "A conclusion in line with U. W. v. Rickert, 188 U. S. 432, and others, where it is held: 'That general acts of Congress do not apply to Indians unless so worked that they clearly manifest an intention to include them in their operation.'"

Does the Income tax law clearly apply to the Indians' income from trust property? The reverse of this question is: Was there not rather an implied, if not express, agreement that such income would be exempt from income tax?

We find that not only are the Income tax laws strictly construed so as not to apply to Indian incomes from tribal and allotted Indian land unless specifically provided but that, on the other hand, the treaties with and laws governing Indians with regards to Indian property are liberally construed and doubtful expressions are resolved in favor of the Indians.

For example, in *Carpenter v. Shaw*, 280 U. S. 363, the State of Oklahoma sought to tax oil royalties coming to individual Indians from allotted lands in a manner similar to the present Timber Income. The Court denied the right to tax because the original "agreement" provided that "all the lands allotted shall be nontaxable while the title remains in the original allottees."

The State of Oklahoma contended that this agreement, strictly construed, limited the nontaxability to the land and not to the income from the land. It argued that the severed oil and gas were personalty and not realty. This, of course, is the general "White Man's Law" but what did the Court do? It held:

> "While in general tax exemptions are not to be presumed and statutes conferring them are strictly construed, the contrary is the rule to be applied to tax exemptions secured by Indians by agreement between them and the national government.

> "Such provisions are to be liberally construed. Doubtful expressions are to be resolved in favor of the weak and defenseless people who are wards of the nation, dependent upon its protection and good faith. Hence, in the words of Chief Justice Marshall: 'The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of, which are susceptible of a more extended meaning than their plan import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense.' . . . and they must be construed, not according to their technical meaning, but *'in the sense in which they would be naturally understood by the Indians'.*" Jones v. Meehan, 175 U. S. 1. (underlining ours).

The Court then held that the provision that the "lands shall remain nontaxable" cannot be taken to be restricted only to those taxes commonly known as land or real estate taxes but must be deemed at least to embrace a tax assessed against the allottees with respect to a legal interest in their allotment less than the whole, and stated:

> "We think it plain that the tax imposed on the royalty interest of the present petitioners is not a tax on oil and gas severed from the realty, but is, by its very terms, a tax upon the right reserved in them as lessors and owners of the fee. . ."

How similar to instant case except, in the above case, the courts were denying the right of a state to tax income from the trust property, holding that what was being taxed was not really income but a right as owners.

In *Choate v. Trapp*, 224 U. S. 665, officers of the State of Oklahoma instituted proceedings to collect taxes on

lands similarly allotted to Indians. It discusses the contract that resulted between the Government and the Indians.

It states that the individual Indian had no title or enforceable right to tribal property, but did have an equitable interest in tribal land and general public domain which Congress recognized and which Congress desired to extinguish. The Congress offered a patent of nontaxable land only to those who would relinquish their claim in other property that the tribe formerly held for common use. The Court continues:

> "There was here, then, an offer of nontaxable land. Acceptance by the party to whom the offer was made, with consequent relinquishment of all claim to other lands, furnished a part of the consideration'. . . Upon delivery of the patent the agreement was executed and the Indian was thereby vested with all the right conveyed by the patent . . .

> "The patent and the legislation of Congress must be construed together, and when so construed, they show that Congress, in consideration of the Indians' relinquishment of all claim to the common property, and for other satisfactory reasons, made a grant of land which should be nontaxable for a limited period. . .

> ". . . It is conceded that no right which was actually conferred on the Indians can be arbitrarily abrogated by statute. But it is claimed that he, in fact, acquired no valid exemption, since it stands on a different footing from the grant of the land itself; and that, though the provision of nontaxability added to the value of the property, it can be withdrawn, be-

cause, if not a gratuity, it is at least subject to the general rule that tax exemptions are to be strictly construed and are subject to repeal unless the contrary clearly appears . . . (then citing the cases) . . . but these rulings are based on the theory that 'the legislature was not making promises,' but framing a scheme of public revenue. . .

" . . . BUT IN THE GOVERNMENT'S DEALINGS WITH THE INDIANS THE RULE IS EXACTLY THE CONTRARY. THE CONSTRUCTION, INSTEAD OF BEING STRICT IS LIBERAL; (caps ours) doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith. This rule of construction has been recognized, without exception for more than a hundred years, and has been applied to tax cases.

" . . . if there is any question as to whether this was a personal privilege and repealable, or an incident attached to the land itself for a limited period, that doubt, under this rule, must be resolved in favor of the patentees. . . "

The foregoing excerpts are quoted to show that it is the settled law to recognize certain tax exemptions or Indian trust property and that all doubts are resolved in favor of the Indians.

We must keep in mind that this whole field of law applies to Indians in their status of wards or holders of the beneficial interest in Indian land allotted to them as in the foregoing cases. The Indian in all other aspects is subject to the same responsibilities to pay taxes as are other citizens.

A landmark case is the case of *Choteau* v. *Commissioner of Internal Revenue*, 38 F. 2d 976, and affirmed in the U. S. Supreme Court on Writ of Certiorari (238 U. S. 691). This is a consolidation of several cases and is easily misunderstood. It concerns the allotments of members of the Osage tribe. Each could select 3 pieces of land of 160 acres each, one of which would constitute a homestead. Further there was certain tribal income from royalties which would go to the United States Treasury for later division. A certificate of competency there, if granted, (different from the Quinaielts) not only removed restrictions on the individual but also on the land. There were similar provisions against incumbrance, etc. The Federal Government sought to levy income tax against this various income. As to Mary Blackbird, a restricted full blood member of the Osage Tribe, the Court held that her income from the trust property was not taxable. The Court says:

> "Her property is under the supervising control of the U. S. She is its ward, and we cannot agree that because the income statute . . . subjects 'the net income of every individual' to the tax, this is alone sufficient to make the acts applicable to her. Such holding would be contrary to the almost unbroken policy of Congress in dealing with the Indian wards and their affairs . . . citing Elk v. Wilkins, 112 U. S. 94, as stating 'General acts of Congress did not apply to Indians, unless so expressed as to clearly manifest an intention to include them'."

The case then cited *Choate* v. *Trapp* on the rule that tax statute exemptions are strictly construed generally but

liberally construed as to Indians, then quotes with approval the Attorney General's opinions cited therein as follows:

> "This practice of safeguarding the Indian has been continuously adhered to. Treaties have been considered, not according to their technical meaning, but in the sense in which they would be naturally understood by the Indians . . . citing cases . . : The Indian has always been the object of special legislation. Never has it been the practice to legislate for him generally along with the rest of the people."

The Court then held for Mary Blackbird but held against Mrs. Pettit and Henry Choteau because they did not come within the definition of Indian wards, Mrs. Pettit being white and he having been issued a certificate of competency.

In *United States v. Homerath*, 40 F. 2d 305, we have facts almost identical to instant case, a noncompetent Indian with allotted lands under the General Allotment Act with a trust deed identical to the one in this case. The first allottee conveyed, with consent of the Interior Department, her interest to her noncompetent son for support during her life. The Court said:

> "It would serve no useful purpose for this court to express extended views upon the problems suggested by this setup of facts. It appears that both the grantor and grantee as Indians were noncompetent and under restriction and that the lands in controversy were likewise under restriction. Ordinarily a noncompetent Indian, being a ward of the Government, is not subject to income tax law. If the restriction applies

therefore to the individual he would not be subject to the payment of income tax.

"If the restriction applies to the land, I am of the opinion that it still existed after the deed from mother to her son was delivered and after the death of the mother. . . Inasmuch as the act itself provided that it can only be transferred on such terms and conditions and other such rules and regulations as the Secretary of Interior might prescribe, I am inclined to the view that the land still retained its restricted character and, being in the ownership and possession of a noncompetent Indian, is not assessable as to the income derived therefrom."

In view of the foregoing there is little question that that Court would have decided in favor of respondent herein.

The case of *Pitman v. Commissioner of Internal Revenue*, 64 F. 2d 740, was an appeal from a decision of the Board of Tax Appeals in which petitioner was a full blood member of the Creek Tribe married to a white man. Their son was allotted about 40 acres of land as a homestead and about 120 acres as a "surplus allotment," which on his death descended to petitioner, (his mother) "by inheritance."

It is to be remembered that the method of allotment in that cast was different from that on the Quinaelt Reservation and the Court distinguished between the homestead and the surplus allotment. It found that, by reason of the statutes pertaining to the particular allotments in that case, the surplus allotment of the half blood son came to lose all restrictions prior to his death but:

"The homestead portion of the allotment, however,

> remained subject to the restrictions provided in Section, supra, until the death of Pitman, Jr., the original Allottee. Upon his death it passed by inheritance to the petitioner, a full-blood Indian heir, and became subject to the qualified restrictions imposed by Section 9, supra, and remained exempt from taxation . . . citing cases. We conclude therefore, that the homestead remained restricted and exempt from taxation, and that the surplus allotment became freed of restrictions and subject to taxation . . ."

The question at issue was whether the oil and gas royalties and bonuses derived by the full blood mother were subject to income tax. Syllabus 7 answers that question as follows:

> "Where enrolled half-blood Creek Indians homestead and surplus allotments were inherited by full-blood Indian, who, in 1922, executed approved oil and gas leases, bonuses received in 1922 for leases of surplus allotment held taxable to lessor as 'income' after proper depletion allowances, but bonuses for leases of homestead allotment were not taxable."

In the present case we have no such thing as a surplus allotment. The land here is equivalent to the "homestead allotment" of petitioner's son in the foregoing case. There is, therefore, no doubt that had that Court had the present case under consideration it would have held the income involved here not taxable. See *Landman* v. *U. S.*, 71 F. Supp. 640, holding that similar lands are not includable for estate tax purposes and that, "While, in general, tax exemptions are not to be presumed and statutes conferring them are to be strictly construed, tax exemptions secured to Indians by agreement between them and the Govern-

ment are to be liberally construed." This case specifically, on page 647, overrules the earlier case of *Landman v. Commissioner*, 123 F. 2d 787, which held such property includable for estate tax purposes.

We could cite numerous other authorities establishing the difference between "White Man's Law" and the "Indian Law" with respect to taxing statutes. All of them hinge on two fundamental principles. These may be stated in the following two questions:

1. Does the tax expressly include the Indians and the pertinent income?
2. What was the understanding of the Indians with regards to the "nontaxability" provisions in their treaties and allotments; and the provision that the lands, hence the income, was for their "sole use and benefit?"

It is submitted that the present tax does not expressly include the Indians and that the case law itself is excellent evidence of the understanding of the Indians in their treaties and allotments in this regard.

B. It was the understanding of the Indians as contracting parties that the income from their allotted lands would be free from taxation.

What did the Indians agree to? Certainly the words of the agreements, the Allotment Act and the trust patents are in themselves insufficient to answer this question fully. As in all contracts, we must go to the acts of the parties. How did the parties act and deal with each other with regards to their agreements?

The whole question becomes essentially this: Can the Commissioner of Indian Affairs, the Secretary of Interior and all their agents counsel and advise the Indians that the agreement provides for such an income tax exemption and that the Indians don't have to pay income taxes on the income from trust property and then, another arm of the Government which had nothing to do with the forming of the agreement come in at a later date and contend that that wasn't the agreement at all and that the Department of Interior had no authority to bind the United States Government in such an understanding?

Or is it not the better law that Uncle Sam must stand behind his agreements and that the Indian agents were authorized representatives of Uncle Sam in making and interpreting agreements with Indians?

After the agreements and allotments were made; one by one all the various questions of taxation began to plague the American Indian. Through the years the Indian agents and their superiors defended the Indians against these threatened invasions. Without citing the cases in detail, a mere glance at the annotations of the General Allotment Act in 25 USCA 331 et seq. shows the sequence of these cases in which counties, cities and states were denied the right to tax Indian property and income. Creditors were denied the right of liens, attachment and foreclosure, and the Federal Government was denied the right of inheritance and estate tax.

During all these years the Indians were asking their

tribal leaders, their priests, ministers and other advisers, and then Government agents whether they had to pay income taxes on the income from trust property. Always the answer was "No." Indians sought at times to file income tax returns, and were told by Internal Revenue agents that such income was not taxable.

Suddenly, after years of such conditioning, the Bureau of Internal Revenue moved against many of the Indians of the Coeur d'Alene and other reservations and levied taxes not only for current years but for past years, adding 25% penalties for failure to file returns, attaching current income without regard to their current financial needs, and reducing such Indians as Julia Nicodemus to abject poverty and open rebellion against the guardian who had turned on them.

Every Indian agency is replete with instances of interpretation by agents of both the Indian Bureau and the Bureau of Internal Revenue of the pertinent treaty agreement, Allotment Act and trust patents, showing a course of conduct through the years of recognizing and substantiating the Indian belief that the income from trust property was not taxable.

For example, the leaders and advisers of Indian tribes all over the nation have copies of the HANDBOOK OF FEDERAL INDIAN LAW by Felix S. Cohen, then Chairman, Board of Appeals, Department of the Interior, with Foreword by Harold L. Ickes, then Secretary of Interior, and printed in 1941, 1942 and 1945 by the U. S.

Government Printing Office. It is acceptable by the Indians as the official interpretation by Uncle Sam of various Indian laws, including the ones pertinent to this action.

Chapter 13, page 254 is devoted to the subject of taxation. The chapter discusses the various fields of taxation. On pages 258 and 259 the effect of the General Allotment Act is discussed. Among other similar quotations it quotes with approval the case of *United States* v. *Nez Perce County, Idaho*, 95 F. 2d 232, as follows:

> "The allotment act, as well as the trust patent, by plain implication granted the Indian immunity from taxation during the trust period or any extension of it, and he had the right to finally receive his lands 'free of all charge or incumbrance whatsoever.' The authorities are uniform to the effect that this right of exemption is a vested right, as much a part of the grant as the land itself . . . etc. . ."

The book continues, "Therefore, it would appear that the allottee under the General Allotment Act obtains a vested right to tax exemption which cannot be taken from him without his consent." The question now is whether this vested right to tax exemption includes an exemption from income taxes.

Page 265, et seq., concerns itself with Federal income taxes, as follows:

> "In considering federal taxation of Indian income, one finds the courts concerned, not as in the case of the state, with the question of whether the state may tax, but with the question of whether the Federal Government has intended to tax. Whether it has done

Government has intended to tax. Whether it has done so in a particular case depends on the construction accorded the taxing statute by the courts. The rule of construction most recently announced is that the Federal Income Tax Law, applying as it does to the income of 'every individual' and to income derived 'from any source whatever,' includes within its application Indians and their income unless they are by agreement or statute exempted.

"It is clear that the exemption accorded tribal and restricted Indian lands extends to the income derived directly therefrom. Accordingly, rents, royalties and other income of Quapaw, Otoe, Otoe and Missouri, and Ponca Indians have been held tax exempt. Likewise, the income derived by individual Indians as their share in the oil or mineral deposits in tribal lands has been held tax exempt.

"Conversely, income which is derived from unrestricted lands has been held taxable . . . Though income derived directly from restricted allotted lands is exempt from federal income taxation, so-called reinvestment income is subject to such taxation."

The foregoing is just a sample of the literature published on this subject for the guidance of Indians, showing what the Indians have been lead to believe by representatives of the Federal Government, the other contracting party.

That the government always considered, until the *Jones* v. *Taunah* case in 1951, income taxes of incomes from land to be a forbidden charge upon the land is clear in all the literature published and circulated by the government until the last few years. (See 34 Op. Atty. Gen. 302; 34 Op. Atty. Gen. 439; 35 Op. Atty. Gen. 107.)

Should the government, not only as a contracting party but as a dominant party dictating a contract or treaty to a weak and defenseless people, now be able to change the studied interpretation it gave to those contracts from the first federal income tax statute to the *Jones v. Tannah* case?

It is apparent that the Ninth Circuit, in deciding instant case, did not think so and considered it a "sorry breach of faith" with these Indians. Judge Clark in *Nicodemus v. United States*, 132 F. Supp. 608, in which the writer was counsel for plaintiff was of a similar opinion. Both courts walked right through the maze of law cited by the Government to the core of the question. That core was the obligations of a great and powerful nation with regards to its solemn promises in dealing with these dependent and defenseless people. Judge Clark in the Nicodemus case discussed this point as follows:

> "The land in question here from which the crops were grown are allotted lands. These allotted lands were set aside to be held forever as Indian lands and it was agreed that no part of said reservation should ever be sold, occupied, open to white settlement, or otherwise disposed of, without the consent of the Indians residing on said reservation; that subsequent application of allotment acts to be effective would have to be made with the consent and agreement of the Indians, and carried with it a contractual obligation of the Government to hold said lands free from such obligation during the trust period and its extension.
>
> "This has been recognized through the years and the testimony of the Indians in support of their con-

tention is that not only did the government through the years recognize the validity of their understanding but through its Indian agents and official documents, among which was the *Handbook of Indian Law* furnished by the Department of Interior, fully advised the Indians that their interpretation was correct.

"Right at the threshold of this inquiry we have to look into the past. Our past history has demonstrated the desire of the Federal power to protect Indians. Much has been said in opinions of the Court heretofore rendered, as to our duties to protect this helpless and dependent people, and this is the just rule to follow. This great race of people has been depleted in numbers; they are helpless; they are under the political power and control of the government of the United States; they are its wards; it is the government's duty, as long as the wardship over the Indians exists, to proceed to protect the Indian lands, and in cases such as this, to assert their exemption from taxation, if the circumstances warrant. . . .

"The government contends that the Indian status as a ward of the government provides no valid reason for excluding his income from the scope of the taxing statutes, and advance the theory that it was the intent of Congress to levy the tax with respect to all residents of the United States, and upon all sorts of income, and that there is no exception exempting the sort of income here involved. The most that can be said about the statute is that it is broad enough to include all citizens; however, it does not use the words 'including Indians.' It is reasonable to say that Congress gave no thought to the Indians at all. They must have had in mind, as stated in plaintiff's brief, the history of the dealings, the treaties and agreements the United States made with the vanquished Indians prior to the passage of this act. Certainly the Indians

were not consulted, nor did they have any opportunity to assert their rights under their agreements and understandings that were in full force and effect at the time of the passage of this act. When these agreements were first made with the Indians it was with the thought in mind that the negotiations should be fair. The government of the United States was represented at the counsel table with the superiorly equipped race. They dictated the terms the Indians had to accept. There can be no question that the Indians were unable to interpret the agreements and were more or less coerced in making them, and we find, upon investigation, that the agreements were generally signed with an 'X' mark, witnessed by the Indian agent, and as contended by the plaintiff, there is no evidence of any contribution made to the agreement by a single Indian, or any change in it at the conference where it was supposedly negotiated. Are we going to say that the Government will take advantage of the general statement in the income tax bill that all citizens and residents are taxed, to the disadvantage of an illiterate and uneducated people? They are still treated as incompetent wards of the Indian Bureau, and leases are prepared and negotiated and their rentals collected by the Indian Agencies."

The court then concludes its opinion with this statement:

"During all the past years they were not even required to file an income tax return, and understood that their income was not taxable and then suddenly, out of a clear sky, they say to the plaintiff in this case 'It makes no difference whether our ward be reduced to poverty and lose her lands, the taxes must be paid.' The Indians are entitled to receive and keep their lands free of all charge and encumbrance whatsoever and this Court, having no exact rule to follow

laid down by courts of superior jurisdiction, is of the opinion that taxation of income from trust property as in the present case, would be in violation of the government's agreements with the Indians and that the income involved in this action is exempt from taxation, and that this court should not permit an injustice such as this when the income tax statute in question has never been held to apply to Indians for a period of 35 years, and during which time the Indians have been lulled into security that their property held in trust by the government is free from taxation."

THE JONES VS. TAUNAH CASE

A. *The Jones* v. *Taunah case*, 186 F. 2d 445, *was based on a misunderstanding of the law enunciated in the cases of Choteau* v. *Burnet*, 283 U. S. 691, *and Superintendent of Five Civilized Tribes* v. *Commissioner*, 295 U. S. 418.

The case for nontaxability of income from restricted Indian trust property was clear until the foregoing case was decided on January 2, 1951. It is clear, in reading the case, that the court based its decision on a complete misunderstanding of the decisions in the *Choteau* v. *Burnet and Supt. of Five Civilized Tribes* v. *Commissioner*, cited above. On page 446 the Court says:

"Standing alone and without more, these general statutory provisions (the income tax law) are broad enough to include income derived from lands allotted to Indians and restricted against alienation, *Choteau v. Burnet*, 283 U. S. 691; *Superintendent of Five Civilized Tribes* v. *Commissioner*, 295 U. S. 418. And it has been held without deviation that exemp-

> tions from federal taxation do not rest upon implication. Unless expressly granted in plain terms, they do not exist."

What a misunderstanding of the law! The cases cited in the middle of this brief clearly hold that the rule as to implied exemptions is different when applied to Indians and that the general rule cited above does not even apply to Indians. The opposite is the law.

But the most astonishing thing is the Court's misinterpretation of the Choteau v. Burnet case. It is apparent that the Court didn't even read the case and didn't notice that, as to Mary Blackbird, the only litigant comparable to Mr. and Mrs. Jones in the Jones v. Taunah case, the exemption was allowed. It is apparent that the Court read only the appeal from the Circuit Court and not the Circuit Court case in 38 F. 2d 976. There was no appeal by Mary Blackbird because the Circuit Court held in her favor. Certainly the ruling against Mrs. Pettit, a white woman, and Henry Choteau, who didn't come within the definition of an Indian ward at all, is not applicable. Henry Choteau, had received his certificate of competency under a specific law applying to his tribe that thereafter his lands, except his homestead, would be taxable. Actually even in the Choteau case the holding was in our favor because it held that the income from his homestead (equivalent to the land in the Taunah and in the instant case) was not taxable.

The Superintendent of the Five Civilized Tribes v. Commissioner, supra, isn't authority to justify the holding

of the Court either. The facts aren't even similar and the question was not the taxability of the income from trust property, but the income from the reinvestment of the income from trust property.

The writer respectfully hopes that the Court will read the entire decisions in Choteau v. Burnet and Five Civilized Tribes v. Commissioner and will note for itself how much error in the contentions of the Government in its present efforts to tax the pertinent income is based on misinterpretations of those two cases perpetuated by "requotes" through subsequent opinions.

REPLY TO PETITIONER'S BRIEF

The cases cited by petitioner demonstrate how, even in the field of Indian Law, each case must stand on its own merits and each case must be carefully read before assuming it applies to instant case.

The court will refer back to our discussion, supra, about the misinterpretation of the *Choteau* v. *Burnet*, 283 U. S. 691, and *Superintendent* v. *Commissioner*, 295 U. S. 418. Yet, on page 11 of his brief, petitioner perpetuates this misunderstanding. I believe my explanation above of these two cases should be enough to show that they do not support petitioner's views at all. As explained, there was no issue in either case pertinent to present case. Mary Blackbird, in the Choteau case, won in the Circuit Court and she didn't appeal. The Superintendent v. Commissioner case merely holds that the income resulting from

the investment of exempt income is taxable. We have no quarrel with that. We would have a similar situation here if the Capoemans had reinvested their timber money in Ford stock and were claiming the dividends nontaxable.

Petitioner cites the case of *Heiner* v. *Colonial Trust Co.*, 275 U. S. 232, and *Commissioner* v. *Glenshaw Glass Company*, 348 U. S. 426, as authority for his position that Congress intended to extend the taxation to the pertinent income. The first case merely holds that the income of a non-Indian lessee of Indian land is not exempt. The Court says:

> "Assuming that the Indians are not subject to income tax, as contended, the fact that they are wards of the government is not a persuasive reason for inferring a purpose to exempt from taxation the income of others derived from their dealings with the Indians . . . Any implication of the exemption of the income of the Indians themselves, if made, must rest on too narrow a basis to justify the inclusion of the income of other persons . . .

If that case is authority for anything, it is authority for the position of the Indians here.

The second case, Commissioner v. Glenshaw Glass Company can be read in vain for any relevant material and holds merely that compensation received in a fraud or anti-trust case for damages is taxable income.

On the same page petitioner cites *Strom* v. *Commissioner*, 158 F. 2d 520. This case, like the others, in no way supports petitioner's position. There is no analogy be-

tween the right to fish and income from allotted, restricted lands. There would be an analogy if, in this case, the return from the timber was not from plaintiff's own lands but from lands he was leasing from others.

On page 14 of petitioner's brief we find a repetition of these citations and others which should be read by the court before being accepted as authority for petitioner's position.

Oklahoma Tax Commission v. U. S., 319 U. S. 598, merely holds that "wardship with a limited power over his property did not, without more, render the Indian immune from the common burden." But that case then holds that the Indian allotted lands were immune to state estate tax and supports respondents' position here.

United States v. *Choctaw, etc.*, 179 U. S. 494, holds no more than that even though treaties with the Indians are given liberal construction in the Indians' favor is no reason to stretch or depart from the plain meaning of the words used. *Choctaw Nation* v. *United States*, 318 U. S. 423, cited by petitioner on page 14 of his brief, states the general rule in the first syllabus:

> "The relation between the U. S. and the Indian is such that treaties between them should receive such an interpretation as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection, without regard to technical rules framed under a system of municipal jurisprudence formulating the rights and obligations of private persons equally subject to the same laws."

Again, on page 15 of his brief, petitioner cites the cases of Choteau v. Burnet and Superintendent v. Commissioner already discussed above and in no way supporting the contentions of the petitioner.

On page 16 of his brief petitioner cites *Landman* v. *Commissioner*, 123 F. 2d 787, as holding that an Indian's estate is subject to federal estate tax. But counsel does not cite the case of *Landman* v. *United States*, 71 F. Supp. 640, decided in the Court of Claims several years later where, on page 747, this later case expressly excepts to the decision of the earlier Landman case and refuses to apply the rule applied in that case and specifically overrules it, if such can be done by the Court of Claims.

It is hoped that the Court will read this later Landman case. The first Landman case held that the net estate of a deceased full blood restricted Creek Indian consisting of a restricted allotment and proceeds of oil and gas produced therefrom were subject to federal estate tax. The case of *Oklahoma Tax Commission* v. *United States*, 319 U. S. 598, held similar property not to be subject to state estate tax. Then the later case of *Landman* v. *United States*, 71 F. Supp. 640 overruled the former Landman case and held (page 648) that, such property having been held to be immune from Oklahoma estate tax, there was "no valid reason for withholding such immunity from similar land sought to be burdened by a federal tax identical in character."

That case, much more than the first Landman case,

states the correct law with regards to Indian trust property. It cites in proper perspective the applicable decisions and particularly the case of *Carpenter* v. *Shaw*, 280 U. S. 363, as authority for the statement that "while, in general, tax exemptions are not to be presumed and the statutes conferring them are to be strictly construed, (citing cases), tax exemptions secured to the Indians by agreement between them and the government are to be liberally construed."

It is therefore seen that, in analysis, this whole sequence of cases supports the view of respondents and not of petitioner.

CONCLUSION

From the foregoing it seems clear that income derived by Indians from restricted, allotted, trust property under treaties and agreements similar to the treaty with the Quinaielts and the General Allotment Act of 1887 is exempt from Federal Income Tax and that the decision of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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